



## **DEPARTMENT 21 - COMPLEX LITIGATION THE HONORABLE WYNNE S. CARVILL PRESIDING**

### **PROCEDURAL GUIDELINES FOR PRELIMINARY APPROVAL OF CLASS ACTION SETTLEMENTS**

Parties submitting class action settlements for preliminary approval should be certain that the following procedures are followed and that all of the following issues are addressed. Failure to do so may well result in unnecessary delay of approval. It is also strongly suggested that these guidelines be considered during settlement negotiations and the drafting of settlement agreements.

1) NOTICED MOTION - Pursuant to California Rule of Court ("CRC") 3.769(c), preliminary approval of a class action settlement must be obtained by way of regularly noticed motion. A motion reservation number must be obtained from the Department 21 clerk before filing. Doing so will ensure proper handling in the court's electronic calendaring system and provide the mechanism for the issuance of a tentative ruling..

2) CLAIMS MADE VS. CHECKS-MAILED SETTLEMENT – The court typically finds that settlement distribution procedures that do not require the submission of claim forms, but rather provide for settlement checks to be automatically mailed to qualified recipients, result in greater benefit to the members of most settlement classes. If a claims-made procedure is proposed to be used, the settling parties must be prepared to explain why that form is superior to a checks-mailed approach.

3) REASONABLENESS OF SETTLEMENT AMOUNT – Admissible evidence, typically in the form of declaration(s) of plaintiffs' counsel, must be presented to address the potential value of each claim that is being settled, as well the value of other forms of relief, such as interest, penalties and injunctive relief. Counsel must break out their potential recovery by claims, injuries, and recoverable costs and attorneys' fees so the

court can evaluate the value of the claims and discern the potential cash value of the claims and how much the case was discounted for settlement purposes. (See *Kullar v. Foot Locker Retail, Inc.* (2008) 168 Cal.App.4th 116.) Where the operative complaint seeks injunctive relief, the value of prospective injunctive relief, if any, should be included in the *Kullar* analysis.

4) ALLOCATION FOR TAX PURPOSES – In employment cases, if the settlement payments are divided between taxable and non-taxable amounts, a rationale should be provided consistent with counsel's *Kullar* analysis. The agreement and notice should be clearly indicate whether there will be withholdings from the distribution checks, and who is paying the employer's share of any payroll tax.

5) RELEASE - The release should be fairly tailored to the claims that were or could be asserted in the lawsuit based upon the facts alleged in the complaint. Releases that are overbroad will not be approved. Furthermore, although the court will not necessarily withhold approval on this basis, it generally considers a plain language summary of the release to be better than a verbatim rendition in the proposed class notice.

6) SETTLEMENT ADMINISTRATION - The proposed Settlement Administrator must be identified, including basic information regarding its level of experience. Where calculation of an individual's award is subject to possible dispute, a dispute resolution process should be specified. The court will not approve the amount of the costs award to the Settlement Administrator until the final approval hearing, at which time admissible evidence to support the request must be provided. The court also generally prefers to see a settlement term that funds allocated but not paid to the Settlement Administrator will be distributed to the class pro rata.

7) NOTICE PROCEDURE - The procedure of notice by first-class mail followed by re-sending any returned mail after a skip trace is usually acceptable. A 60-day notice period is usually adequate.

8) NOTICE CONTENT - The court understands that there can be a trade off between precise and comprehensive disclosures and easily understandable disclosures and is willing to err on the side of making the disclosures understandable. By way of illustration, parties should either follow, or at least become familiar with the formatting and content of The Federal Judicial Center's "Illustrative" Forms of Class Action Notices at <http://www.fjc.gov/>, which conveys important information to class members in a manner that complies with the standards in the S.E.C.'s plain English rules. (17 C.F.R. § 230.421.)

Notices should always provide: (1) contact information for class counsel to answer questions; (2) a URL to a web site, maintained by the claims administrator or plaintiffs' counsel, that has links to the notice and the most important documents in the case; and (3) for persons who wish to review the court's docket in the case, the URL for the court's electronic filing and calendaring system known as DomainWeb. Further

information and suggested language to be included in class notices is set forth in the court's document entitled Dept. 21 Court Contact Info (Class Notices).

9) CLAIM FORM - If a claim form is used, it should not repeat voluminous information from the notice, such as the entire release. It should only contain that which is necessary to elicit the information necessary to administer the settlement.

10) EXCLUSION FORM - The notice need only instruct class members who wish to exclude themselves to send a letter to the settlement administrator setting forth their name and a statement that they request exclusion from the class and do not wish to participate in the settlement. It should not include or solicit extraneous information not needed to effect an exclusion.

11) INCENTIVE AWARDS - The court will not decide the amount of any incentive award until final approval hearing, at which time evidence regarding the nature of the plaintiff's participation in the action, including specifics of actions taken, time committed and risks faced, if any, must be presented. (*Clark v. American Residential Services LLC* (2009) 175 Cal.App.4th 785, 804-807.)

12) ATTORNEY FEES - The court will not approve the amount of attorneys' fees until final approval hearing, at which time sufficient evidence must be presented for a lodestar analysis. Parties are reminded that the court cannot award attorneys' fees without reviewing information about counsel's hourly rate and the time spent on the case, even if the parties have agreed to the fees. (*Robbins v. Alibrandi* (2005) 127 Cal.App.4th 438, 450-451.) Further information regarding fee approval is set forth in the court's Procedural Guidelines for Final Approval of Class Action Settlements.

13) PROPOSED ORDER GRANTING PRELIMINARY APPROVAL – All proposed orders should include the requisite "recital," "finding," and "order" language, including adequate information to provide clear instruction to the settlement administrator. The proposed order should also attach the proposed notice and any associated forms as exhibits.